Supreme Court of the United States

OCTOBER TERM, 1948

No. 363

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Felix T. Boylan, Nobert S. Glasscheib, and Consolidated Tile Co., Inc., a corporation, respectfully petition this Honorable Court and show that this is a petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to review a judgment made and entered by that Court on July 23, 1948, which reversed in part a judgment of the District Court of the United States for the Southern District of Mississippi, made and entered on August 16, 1947 (R. 2240-1) and remanded the cause with directions (fol. 2281; R. 2279-80).

Summary Statement of Case

The claims of the respondents, Louis Detrio, Sylvester Detrio and Francis L. Marks, as set out in their complaints, are summarized in footnote "1" of the opinion of the Court of Appeals (fol. 2271, R. 2270-1).

In their original complaints, the respondents claimed to be partners of the partnership, Consolidated Tile and Deck Coverings,—a limited partnership organized and existing under the laws of the State of New York,—as of January 2, 1945, under a *written agreement*, which is marked Plaintiffs' Exhibit E (R. 40-45). In the amended complaint, the respondents altered the basis of their claims, and sought recovery under an *oral agreement* of partnership, claimed to have been made on or about February 28, 1945 (R. 63-65), and in their amendment to the amended complaint, made at the close of the trial (R. 2172), they alleged that this oral agreement was *amendatory* of the original written articles of limited partnership, marked Exhibit "A" (R. 22-30).

These claims, including those of fraud, conspiracy and conversion were specifically denied by the petitioners in their answer to the original complaint (R. 147-183), and their answer to the amended complaint (R. 201-223), and their further answer to the amendment of the amended complaint made at the close of the trial (R. 2171).

On September 4, 1945, and long prior to the institution of the action in the District Court, the respondent, Sylvester Detrio had commenced an action in the Supreme Court of the State of New York, New York County, against the petitioners Felix T. Boylan and Nobert S. Glasscheib, and others, for an accounting and the dissolution of the partnership. The pleadings in that action, which are marked Exhibit "1", are attached to and made part of the answer of the petitioners to the original complaint (R. 169-183).

In the New York action, the respondent, Sylvester Detrio, predicated his action on a partnership agree-

ment, allegedly made on or about February 24, 1945, which is similar to the oral agreement alleged by the respondents in their amended complaint.

The petitioners in their answer to the original complaint rendered an accounting to the respondent Sylvester Detrio,—on the basis of an 8% interest, and not on the basis of 5% as claimed by him,—and deposited the sum thus shown to be due him, which is now in the Registry of the District Court (R. 166-169).

The matters put in issue by the pleadings were fully litigated before the District Judge, as is evidenced by the voluminous record before the Court of Appeals and now before this Court on the petition for the Writ of Certiorari.

The District Judge who had the full opportunity of seeing the witnesses and judging their credibility, and after considering all of the evidence adduced, both oral and documentary, and after weighing the preponderences, drawing inferences, comparing presumptions, probing intent and balancing hypotheses, made his written Findings of Fact and Conclusions of Law (R. 2225-2240).

The District Judge found that the laws of the State of New York govern insofar as the formation of the limited partnership and any amendments thereto. The attempts to amend the original articles of partnership were incomplete and insufficient for the reason that there was never at any time a complete meeting of the minds of all parties in interest, either oral or written, touching the subject matter of the proposed amendment to the partnership (R. 2238-9). The District Judge further found that neither respondent Marks nor respondent Louis Detrio put up any part of his necessary capital contribution either in cash or property (R. 2234), and

that there was no gift of any interest in the partnership to the respondents, Marks and Louis Detrio, with the consent of all of the partners, that they should come in as partners in the partnership (R. 2239).

The District Judge further found that the proposed amendment to the articles of partnership, by which the respondent Louis Detrio would re-enter the partnership, and the respondent Marks would be taken into the partnership, was never adopted or agreed to, and they therefore did not become partners and were not entitled to any relief (R. 2239).

The District Judge further found that the petitioners, Boylan and Glasscheib, were acting in good faith and without any fraud or intent to defraud when they formed the corporation, Consolidated Tile Co., Inc., under the laws of the State of New York (one of the petitioners herein), and that the corporation was legally formed. That part of the assets of the partnership belonging to petitioners, Boylan and Glasscheib, were transferred to the corporation, and ample partnership assets were retained by the partnership to pay respondent, Sylvester Detrio, his 8% interest (R. 2237). The petitioners, Boylan and Glasscheib committed no fraud and were guilty of no stealing, conversion or misappropriation of any funds or property as was alleged in the complaint and the amended complaint (R. 2238).

The District Judge, in the judgment entered in the cause on August 16, 1947, specifically stated that the Court took jurisdiction of the suit for the purpose of determining if a new partnership had been formed wherein the respondent Louis Detrio would be a member. Having found that no such partnership was formed, the Court permitted the respondent Sylvester Detrio to withdraw the amount tendered and deposited, and relegated

him for any further rights to his pending suit in the State of New York, the domicile of the partnership (R. 2240-1).

The Court of Appeals in its opinion sustained the District Court in its findings in favor of the petitioners on the issues of fraud, conversion and misappropriation, as well as the legality of the formation of the corporation, Consolidated Tile Co., Inc. It also sustained the District Court in its finding that the written agreement (Exhibit E) was legally insufficient and therefore unenforceable (footnote 4, fol. 2275, R. 2274-76; fol. 2280, R. 2279). The Court of Appeals also affirmed the judgment of the District Court as to the respondent Marks (fol. 2280, R. 2279; fol. 2281, R. 2279-80).

However, the Court of Appeals found that by an *oral agreement* of February-March, 1945, the original written articles of limited partnership were amended, and under such oral agreement the respondent Louis Detrio re-entered the partnership as of March 2, 1945, on a basis of 36% of the profits, and as of the same date the interest of the respondent Sylvester Detrio in the partnership was reduced from 8% to 5%.

The Court of Appeals thereupon reversed the judgment of the District Court as to the respondents, Louis Detrio and Sylvester Detrio, and remanded the cause with directions to take and state an account on the basis found by it, and to enter judgment accordingly. In addition, the Court of Appeals ordered and adjudged that "the appellees Felix T. Boylan and others, be condemned in solido to pay the costs of this cause in this Court" (fol. 2281, R. 2280).

Questions Presented

(1) Can a limited partnership, formed and existing under the laws of the State of New York, admit a general partner by oral agreement, when the express provisions of Sec. 98 (1) (e) of the New York Partnership Law specifically provide that no general partner can be admitted without the written consent or ratification of all of the limited partners?

(2) Can such limited partnership be orally amended so as to admit a general partner, when the original written articles of partnership specifically provide that any amendments or alterations thereto must be in writing under the joint hands of all parties?

(3) Under the provisions of the New York Partnership Law, does an assignment by a partner of a portion of his partnership interest to a stranger, make the assignee a partner of the partnership?

(4) Can a person become a general partner and participate in the profits when he does not make his required capital contribution, as specifically agreed to by him?

(5) Has there been an abuse of discretion by the Court of Appeals, when in its judgment it awarded total costs against your Petitioners in solido?

Jurisdiction

This Court now has the power of unrestricted review of cases in the Courts of Appeals, either before or after rendition of judgment or decree, brought up on certiorari.

28 *United States Code*, Sec. 1254 (1). (See Appendix).

Reasons for Granting Writ of Certiorari and Specification of Errors

(1) The finding of the Court of Appeals that the respondent Louis Detrio re-entered the limited partnership under an oral agreement of amendment of the written articles of limited partnership, was contrary to the express prohibitory provisions of the New York Partnership Law applicable to limited partnerships.

Sec. 98 (1) (*e*), *Partnership Law*, Chap. 39 of Consolidated Laws of State of New York. (See Appendix.)

(2) The finding and judgment of the Court of Appeals, that the respondent, Louis Detrio, became a partner by reason of the oral assignments to him from various interests of the partners, was contrary to the provisions of the New York Partnership Law and in conflict with the applicable local decisions.

Sec. 53, *Partnership Law*, Chap. 39 of Consolidated Laws of the State of New York. (See Appendix);

Hammond Oil Co. v. *Standard Oil Co.*, 259 N. Y. 312, 325;

Becker v. *Hercules Foundries, Inc.*, 263 N. Y.) App. Div. 991.

(3) The decision of the Court of Appeals, that the original written articles of limited partnership were orally amended with the consent of all of the partners, so as to admit the respondent Louis Detrio as a general partner, completely disregarded the well established and uncontroverted facts adduced at the trial and nullified the express provisions of said agreement.

(4) The Court of Appeals in deciding that the respondent Louis Detrio became a partner without making his required capital contribution, completely disregarded the uncontroverted and established facts adduced at the trial.

(5) The Court of Appeals, in sustaining the findings of fact of the District Court, in favor of the petitioners on the vital issues of fraud, conspiracy, conversion and misappropriation, as well as sustaining the judgment of dismissal as against the respondent Marks, grossly abused its discretion when it awarded all costs against your petitioners in solido.

Since the Court of Appeals has decided important questions of law under the New York Partnership Law contrary to its express provisions, and in conflict with the applicable local decisions, this Court has the power to review the judgment of the lower Court under its supervisory powers over the administration of justice in Federal Courts.

McNabb v. *United States*, 318 U. S. 332, 340;

Thiel v. *Southern Pacific Co.*, 328 U. S. 217, 225;

Forsyth v. *Hammond*, 166 U. S. 506.

This Court has the unrestricted right to correct excesses of jurisdiction and will grant a review in the furtherance of justice.

In re Chetwood, 165 U. S. 443;

In re Watts and Sachs, 190 U. S. 1.

This Court has held that appellate courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed.

Price v. *Johnston*, 334, U. S. 266, 291.

The corollary of this proposition is equally true. The appellate courts cannot make factual determinations, decisive of vital rights, which are contrary to the crucial facts fully developed on the trial and which are wholly uncontroverted.

We respectfully submit that this case is one of gravity and importance which should be reviewed by this Court.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Honorable Court for its review and determination the full and complete Transcript of the Record of proceedings in the case numbered and entitled, "Louis Detrio, et al., Appellants versus Felix T. Boylan, et al., Appellees", Docket No. 12,279, so that the judgment of the Court of Appeals, Fifth Circuit, may be reviewed and reversed by this Honorable Court, and that the cause be remanded by this Honorable Court to the United States Court of Appeals, Fifth Circuit,

for further proceedings, and your Petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated: New York, N. Y., October 22d, 1948.

Respectfully submitted,

FELIX T. BOYLAN,

NOBERT S. GLASSCHEIB,

CONSOLIDATED TILE CO., INC.,

By

SOL M. SELIG,

Attorney for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1948

FELIX T. BOYLAN, *et al.*,

Petitioners,

vs.

LOUIS DETRIO, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

Statement

This cause came before the United States Court of Appeals, Fifth Circuit, on an appeal by the respondents from a judgment of the District Court for the Southern Ditsrict of Mississippi, dated August 16, 1947, which dismissed the respondents' suit with prejudice, and relegated respondent Sylvester Detrio for any further rights to his action in New York courts,—a suit instituted by him long before the commencement of this cause in the District Court.

The Court of Appeals affirmed the judgment as to the respondent Marks, but reversed it as to the respondents Louis Detrio and Sylvester Detrio, and remanded the cause with directions. The date of affirmance and partial reversal is July 23, 1948 (fol. 2281, R. 2279-80).

The opinion of the Court of Appeals is contained in the Record (fols. 2270-2280, R. 2269-2279). The petition for rehearing, filed by the petitioners in the Court of Appeals was denied without opinion on September 16, 1948 (fol. 2286, R. 2285).

In view of the voluminous record, and in order to assist this Court, we are taking the liberty of quoting at length some of the pertinent testimony contained in the Record, to which we desire to call attention. We therefore respectfully ask the Court's indulgence.

POINT I

The Court of Appeals decided important questions of the New York Partnership Law in a way contrary to its express provisions and the applicable decisions of the New York courts.

The District Court in its Conclusions of Law (R. 2238) held that the laws of New York govern. The respondents in their pleadings as well as in their main brief filed in the Court of Appeals (Point I), conceded that the New York Laws are controlling in the cause.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.

The limited partnership, Consolidated Tile and Deck Coverings, was created under the provisions of Article 8, of the New York Partnership Law, (relating to limited partnerships), and specific mention of this fact is made in paragraph "1" of the written articles of partnership (Exhibit "A") (R. 23).

The New York Court of Appeals has held in the case of *Lanier* v. *Bowdoin*, 282 N. Y. 32, that a limited partnership is exclusively a creature of the statute. Being such, the provisions of the New York Partnership Law, governing its formation, amendment and conduct, must be strictly adhered to and complied with.

I.

Section 98 (1) (e) of the New York Partnership Law (See Appendix), specifically provides that no general partner of a limited partnership, has the right, power or authority to admit a person as a general partner "without the written consent or ratification of the specific act by all the limited partners".

In conformity with this prohibition, paragraph 16 of the original articles of partnership (R. 30) specifically provided that any alterations or amendments of said articles were required to be in writing under the joint hands of all parties.

The attention of this Court is respectfully called to the fact that all prior amendments to the original articles of partnership were in *writing*, as required by law as well as by the terms of the partnership agreement. The certificate of amendment of May 15, 1943, under which additional limited partners were admitted (Exhibit B, R. 30-32), as well as the certificate of amendment of September 1, 1944, showing the withdrawal of the respondent Louis Detrio, as a general partner (Exhibit D, R. 36-39), were signed by the respondents, Louis Detrio and Sylvester Detrio, as well as all of the remaining partners.

The uncontradicted testimony of respondent Louis Detrio, fully substantiated by his own written memo-

randum, conclusively established that the discussions had between the petitioner Boylan and himself in February, 1945, touching upon his re-entry into the partnership as a general partner were merely tentative in form, and that all of the terms to be agreed upon were to be reduced to writing and signed by all of the partners before it would become valid and binding. Such signed agreement would then become an amendment to the original articles of partnership and conform with the provisions of the New York Partnership Law, as well as with the terms of the original partnership agreement.

Respondent Louis Detrio testified (R. 1542):

> "Q. And wasn't it understood between you and Mr. Boylan that this agreement was to be reduced to writing?
> A. Yes."

a fact which he subsequently and on March 19, 1945, confirmed in writing to respondent Glasscheib, when he wrote as follows (Deft. Ex. I-I) (R. 1545):

> "I signed and had notarized mine, Anthony and Phil's signature on enclosed. Phil's letter to you explained the enclosed to be filed *& new agreement to be drawn up by Selig.*" (Italics ours.)

When the respondent Louis Detrio was questioned about this written memorandum, he gave the following pertinent testimony (R. 1544):

> "Q. I am asking you this: Did you on this memorandum dated March 19, 1945, which I show you, state, 'I signed and had notarized my, Anthony's and Phil's signatures on enclosed. Phil's letter to you explained the enclosed to be filed and new agreement to be drawn by Selig.' Now

what did you refer to by 'new agreement'?

A. Probably our contract of February.

Q. That is the contract where you would be brought back into the copartnership?

A. That's right.

Q. So that in March, 1945, at the time when you wrote this memorandum, the agreement had not yet been prepared?

A. No. sir.

Q. The terms had not been discussed as to what would go into the agreement?

A. Made no difference.

Q. I asked you the question and I ask you to please make a responsive answer.

A. No, there was no discussion about it."

The District Judge made particular reference to this Exhibit (Deft. Ex. I-I) in his findings of fact. (See Finding No. 14; R. 2232-3).

The written agreement (Exhibit E) (R. 40-47) which was prepared to effectuate the prior tentative oral agreement, but which was not agreed to and signed by all of the partners, was held by the District Judge to be legally insufficient and unenforceable, and his findings were sustained by the Court of Appeals in its decision (fol. 2280, R. 2279; see also footnote 4 [9] and [10]; R. 2274, 2276).

Notwithstanding these facts and findings, the Court of Appeals nevertheless held that while the written agreement was legally insufficient and unforceable, the prior oral agreement was legally sufficient, and directed the District Court "to find that by the oral agreement Louis Detrio re-entered the partnership of March 2, 1945, on a basis of 36% of the profits" (fol. 2280, R. 2279; fol. 2281, R. 2279-80).

We respectfully submit that under the prohibitory provisions of Section 98 (1) (e) of the New York Partnership Law, and the express provisions of paragraph 16 of the original articles of partnership, the oral agreement as found by the Court of Appeals is legally insufficient and therefore unenforceable.

II.

The Court of Appeals in its opinion (fol. 2275, footnote 4, [8], R. 2275; fol. 2280, R. 2279) held that under the oral agreement of February-March, 1945, respondent Louis Detrio, (who at that time had no connection with the partnership), acquired by assignment certain partnership interests from the various partners, totalling in all to 36%, and by reason thereof, he became a partner with a 36% interest in the profits.

Under the New York Partnership Law, and the applicable decisions of the New York Courts, an assignee of a partnership interest does not thereby become a partner.

> *Sec.* 53, *Partnership Law,* Chap. 39, Consolidated Laws of State of New York (see Appendix);
>
> *Hammond Oil Co.* v. *Standard Oil Co.,* 259 N. Y. 312, 325;
>
> *Becker* v. *Hercules Foundries, Inc.,* 263 (N. Y.) App. Div. 991.

In the case of *Hammond Oil Co.* v. *Standard Oil Co.* (*supra*), the New York Court of Appeals stated (p. 325):

> "It is true that the sale of a partnership interest by one partner does not necessarily dissolve the partnership. Nevertheless, the purchaser

> does not thereby become a partner; does not become entitled 'to interfere in the management or administration of the partnership business'; does not gain the right to 'require any information or account of partnership transactions'; becomes entitled only 'to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled'. (Partnership Law: Cons. Laws, Ch. 39, Sec. 53.)"

We therefore respectfully submit that the determination of the Court of Appeals, that the acquisition by respondent Louis Detrio of certain percentages by assignment made him a partner, is contrary to the provisions of the New York Partnership Law and the applicable decisions of the New York Courts.

POINT II

The Court of Appeals made factual determinations, decisive of vital rights, which were contrary to the crucial facts, wholly uncontroverted, and fully developed upon the trial.

I.

The Court of Appeals, in its opinion (footnote 5, fols. 2277-8, R. 2277), refers to the testimony of petitioner, Boylan, (R. 709-10) as showing that there was complete unanimity amongst the partners for respondent, Louis Detrio, to re-enter the existing limited partnership as a general partner as of March 2, 1945, with a 36% interest in the profits from and after that date. The Court overlooked or completely disregarded the important and ex-

planatory testimony given by petitioner, Boylan, immediately following the part quoted by the Court (R. 710):

> "A. Well, I can say this: I did tell Louis on March 1 that his brothers, after I explained to them over the phone—I had to go further even because Louis Detrio asked me what the set-up would be and I said, 'after I talk to the boys I will be able to tell you', so I did get them on the phone and I have here a memorandum that each of them agreed to give varying percentages and amounting to 22%. So I said, 'I have 50% and if I give you 14 of this, for which you will pay me, we'll both have 36%', and that was agreed and *I said on this basis Louis Detrio was to make a cash capital contribution of* 36% *of* $120,000 *of the new partnership and he was to pay* $43,200 *and this sum was to be exclusive of the* $7,500 *he was to pay me and he agreed to this arrangement.* The only other question that came up was when I spoke to Glasscheib and asked him to give up 8%, he said, 'well, how about my salary. You know you gave me the interest after he got out and I gave up the salary.' I said, 'how much salary do you want?' He said, '$8,000'. So I said to Louis, 'he wants $8,000.' I said to him, 'I offered him $5,000 and he said, 'let's compromise at $6,500.'" (Italics ours.)

This excerpt, when read in conjunction with the excerpt quoted by the Court of Appeals clearly shows that as a condition precedent, respondent, Louis Detrio, was required to make a capital contribution. This was further emphasized when counsel for respondents again

interrogated petitioner, Boylan, with reference to the capital contribution to be made by respondent, Louis Detrio. The following testimony was given (R. 731):

> "Q. Then I believe you took that up with all the parties and they were all agreeable to the set-up? You phoned some of them and saw others individually, I believe?
>
> A. Yes, sir. As I said further, however, it was also agreed that same day that for his 36% —that the new partnership setup would be $120,000, and that his interest of 36% he was to pay cash $43,200 and this was to be exclusive of the $7,500 he was to pay me. In other words, 36% of $120,000, $43,200, and he agreed to this and then also agreed that Glasscheib was to get his $6,500, and that agreement was to start March 1."

With reference to the cash capital contribution which respondent, Louis Detrio, was required to make under the agreement, respondent, Boylan, further testified (R. 974):

> "Q. Did you have any conversations with Mr. Louis Detrio at that time about the payment of his cash capital contribution to the copartnership?
>
> A. Yes, I did have conversations with him.
>
> Q. What did Mr. Louis Detrio say to you and what did you say to Mr. Louis Detrio at that time?
>
> A. I told him that he had better get in his cash contribution and he said he was going to sell some securities and do so."

Respondent, Louis Detrio, admitted that he did not make his required capital contribution (R. 1563):

> "Q. I ask you again, did you actually pay into the Consolidated Tile and Deck Coverings any money as your capital contribution from the date when you signed this agreement (Pltffs. Ex. 5) which was in May, 1945? Did you actually put any money into the Consolidated Tile and Deck Coverings?
>
> A. If you mean, Mr. Selig, that I went to a bank and drew out in nickels and brought them to the New York office and laid them on the table, no."

The finding by the District Judge that respondent, Louis Detrio, did not make his required capital contribution (Finding No. 16; R. 2234) is therefore fully supported by the uncontradicted evidence.

Since the respondent failed to make his required capital contribution and to perform his part of the agreement, he did not become a partner. Not being a partner, he cannot recover any profits.

Smith v. *Maine*, 145 (N. Y.) Misc. 521;

Thomas v. *Wisconsin Dept. of Taxation and Finance*, 250 Wisc. 8, 26 N. W. 2d 310;

McGraw v. *Pulling*, (Miss.) 1 Freeman's Chancery 357.

II.

The Court of Appeals, in its opinion, made this categorical finding (fol. 2279, R. 2278):

> "We, therefore, agree with appellant that the

findings of the District Judge, that the February-March oral agreement was never completed and that no partnership resulted from it, were clearly erroneous, indeed without any support in the evidence, and that this is so also as to his finding that Detrio's purchase of 14% from Boylan was contingent and revocable."

This finding is wholly contrary to the uncontroverted evidence of the respondents and their witnesses. We are taking the liberty of setting out the important excerpts of the testimony adduced on the vital and decisive question as to whether there was a complete meeting of the minds,—a necessary prerequisite to any contract. We feel certain it will aid the Court in going through the voluminous record.

Respondent, Louis Detrio, testified (R. 1541):

"Q. So that at no time during the month of February or during the month of March that you had any conversation with any of your brothers and with Mr. Glasscheib with reference to your re-entry into the partnership?

A. I personally did not."

He further testified (R. 1539):

"Q. I am asking you, was there any date set in the conversation between you and Mr. Boylan on March 1, as to the effective date of your re-entry into the copartnership?

A. No, sir."

On page 1537 of the Record, respondent Louis Detrio testified as follows:

"Q. Now, you stated that at that meeting there was some discussion with reference to your coming back into the copartnership?

A. Yes, sir.

Q. Becoming a general partner?

A. Yes.

Q. And only you and Mr. Boylan becoming general partners and all the others remaining limited partners?

A. Yes.

Q. And at that time the effective date of your re-entry into the copartnership was March 1, 1945?

A. No date set, Mr. Selig, by anybody.

Q. That was left in abeyance?

A. We hadn't even thought about it."

Respondent, Louis Detrio, when testifying with reference to the terms of the written agreement which was to be drawn with reference to his readmission into the partnership, gave this significant testimony pertaining to the prior oral agreement, which the Court of Appeals sustained (R. 1557):

"Q. And do you remember my asking you if that was part of the agreement you had prior to the time when you were to come in, do you remember that?

A. *We never expressed the terms of the agreement in February, Mr. Selig.*" (Italics ours.)

and when testifying orally before the District Judge, he categorically stated as follows (R. 1964):

"I asked Mr. Boylan when would this partnership become effective. Orally we had agreed, but we had never considered whether it would begin March 1 or April or any time."

This testimony therefore clearly established that the terms of the alleged oral agreement of March 2d had not been determined nor agreed upon, but were held in abeyance until the agreement was reduced to writing and signed by all the partners, as required by the original articles of partnership and the applicable provisions of the New York Partnership Law.

Anthony Detrio, a partner, called as a witness in behalf of the respondents, testified that he was present part of the time at the initial meeting on February 26, 1945, held between respondent, Louis Detrio, and petitioner, Boylan. On cross-examination he testified (R. 603):

"Q. During that time, what was said by Mr. Boylan?

A. He told me he had talked to Louis about coming back into the partnership and he gave me the set-up. He asked me if I would give back 3% and I said I would immediately.

Q. At that time what was the effective date that was agreed upon for your brother, Louis, to come back into the partnership?

A. Starting the first of the year.

Q. Are you certain of that?

A. Positive."

Subsequently he altered his testimony and stated (R. 610-11):

"Q. The only thing you know was that Mr. Detrio, your brother, Louis, was to come back into the partnership on the same basis as existed before and that it was to be effective as of February 1, 1945?

A. That is right.

Q. Was there anything said with reference to making the effective date March 1, 1945?

A. No one talked to me about it."

Albert Detrio, who was a partner, was also called as a witness in behalf of the respondents. He testified that he would not relinquish any part of the percentage of his interest in the partnership to respondent, Louis Detrio, and stated (R. 421):

"Q. Before you sold out to Mr. Boylan, you insisted upon 13%?

A. That is right.

Q. And up to the time when you sold out to Mr. Boylan, you were always insisting that you were entitled to thirteen percent?

A. That is right."

Later in his testimony, when he was questioned about the telegram from respondent, Louis Detrio, to petitioner, Boylan (Defts. Ex. JJ; R. 1586) wherein the respondent, Louis Detrio, had wired petitioner, Boylan, to have Albert Detrio withdraw on a basis of 8% interest and not on the basis of his 13% interest, he (Albert Detrio) gave the following important testimony (R. 441-2):

"Q. Didn't Mr. Boylan show you a telegram that he had received from Mr. Louis Detrio, your brother, asking that you, if you were getting out, to get out at 8 percent?

A. I believe that Louis was insisting right along that I get out at 8 percent.

Q. You didn't want to get out at 8 percent?
A. No, sir.

Q. You wanted to get out at 13 percent?
A. That is right. I hadn't signed any agreement at the time and I thought I was entitled to 13 percent.

Q. There was no other agreement on September 1, 1944, upon which you and your brothers were operating there with Mr. Glasscheib and Mr. Boylan?
A. As far as written agreement but there was just that verbal testimony through Mr. Boylan about getting Louis back.

Q. You disregarded that agreement?
A. That is right.

Q. It had no force and effect insofar as you were concerned?
A. I didn't think it had.

Q. You insisted on having 13%?
A. Yes, sir."

John Detrio, another partner, was also called as a witness in behalf of respondents. In his letter of July 14, 1945, to petitioner, Glasscheib (Defts. Ex. Y; R. 1187) he stated that as late as that day he was seeking to make an agreement with petitioner, Boylan, "for the sake of all of us" as to the respective partnership holdings *on the basis of the last signed agreement*, namely, that of September 1, 1944, thus conclusively establishing that he did not acquiesce to the oral agreement of February, 1945.

Even the respondent, Sylvester Detrio, did not recognize the respondent, Louis Detrio, as a partner, for as late as June 2, 1945, he wholly disregarded the letter of the respondent, Louis Detrio (Defts. Ex. X), to reduce the salary of Albert Detrio (R. 1190).

The foregoing testimony, taken in conjunction with the written memorandum of March 19, 1945, from respondent, Louis Detrio, to petitioner, Glasscheib (Defts. Ex. I-I) discussed under Point I of our brief, leads to the inescapable conclusion that at no time was there a complete meeting of the minds of all parties in interest with reference to the alleged oral agreement of March 1, 1945, under which respondent, Louis Detrio, was to re-enter the partnership as a general partner.

Inasmuch as the written agreement (Exhibit E) was legally insufficient, and since the minds of the parties never met on the alleged oral agreement of February 28, 1945, the District Court was fully justified in its conclusion of law (R. 2239) that "there was never at any time a complete meeting of the minds of all the parties in interest, either oral or written, touching the subject matter of the proposed amendment to the partnership".

Since there was never at any time a complete meeting of the minds of all of the parties in interest, no valid partnership agreement resulted. The purchase by respondent, Louis Detrio, from petitioner, Boylan, of a 14% interest was therefore necessarily contingent and revocable. As was held in the case of *McNamara* v. *Gaylord*, 3 Ohio Fed. Dec. 543, 1 Bond. 302 (cited with approval in *Burnet* v. *Leininger*, 285 U. S. 136) at page 546:

> "One partner cannot by agreement sell a part of his interest and compel the other partners to accept the vendee as a member of the firm."

Respondent, Boylan, could not do something indirectly which, as a matter of law, he could not do directly.

We therefore respectfully submit that the Court of Appeals erred when it made factual determinations contrary to the uncontroverted facts fully established, and stated that the findings of the District Court "were clearly erroneous, indeed without any support in the evidence". The judgment of reversal of the Court of Appeals, predicated on such erroneous findings, should be reviewed by this Court under its supervisory powers and in furtherance of justice.

POINT III

The Court of Appeals abused its discretion when it awarded total costs against petitioners in solido.

The Court of Appeals affirmed the judgment of the District Court in the dismissal with prejudice against respondent, Marks. The Court also sustained the District Court in its findings that the written agreement (Exhibit E) was invalid and unenforceable. On the main issues of fraud, conspiracy, conversion and misappropriation, the findings of the District Judge were sustained. The issues of the formation of the respondent, Consolidated Tile Co., Inc., the New York corporation, and the transfer to it of partnership assets belonging to petitioners, Boylan and Glasscheib, resolved in favor of the petitioners, were also sustained by the Court of Appeals. The bulk of the voluminous record pertains to these issues. The testimony with reference to the alleged oral agreement of February, 1945, constituted but an infinitesimal part of the record.

Notwithstanding all this, the judgment of partial reversal of the Court of Appeals decrees that the petitioners in solido "be condemned to pay the costs of this court" (fol. 2281, R. 2280).

Under Rule 31 (3) of the Court of Appeals, Fifth Circuit (see Appendix), the cost of the transcript from the Court below is taxable as part of the costs. The Clerk of the Court of Appeals has informed us that the costs in that Court will amount to approximately $2,-716.25. Counsel for respondents has stated in a motion made in the Court of Appeals, that the cost of the transcript will be "in an amount between six and seven thousand dollars". The total amount of costs will therefore be upwards of $10,000.00.

The respondents, whose duty it was to make up the record on appeal, designated the "entire record" for the consideration of the Court of Appeals (R. 2263-6). Later they filed an amendment to their original designation so as to include additional documents (R. 2266-7). Subsequently, when respondents sought to diminish the record, petitioners voluntarily entered into a written stipulation (R. 1-4) and the size of the record was thereby decreased by upwards of 1,000 pages.

The present size of the diminished record, with its prolixity and repetitiousness is not attributable to the petitioners or their counsel. The record has to do primarily with the written agreement (Exhibit E), the formation of the corporation, fraud, conversion, misappropriation, conspiracy and the alleged interest of the respondent, Marks. On all of these issues the Courts, both District and Appellate, found in favor of petitioners.

We are not unmindful of the fact that the Court of Appeals has full control of costs in equity cases and

can grant and withhold costs in its discretion. However, that discretion must be reasonably exercised.

The Court of Appeals, Fifth Circuit, has held that where the greater portion of the record on appeal is fairly attributable to matters on which the appellants were unsuccessful, the cost thereof should be borne by them.

> *Highway Constr. Co. of Ohio* v. *City of Miami, Fla.*, 126 F. 2d 777, 782.

That Court, in a recent opinion in the case of *Phillips Petroleum Co.* v. *Williams*, 159 F. 2d 1011, stated categorically (p. 1012):

> "Where, however, as here and as is often the case, there is a large record, it is of real moment that the rules designating and printing be complied with. This Court will, therefore, not only entertain with sympathy motions to retax for excessiveness but will of its own motion more often scrutinize records for abuses in this regard with a view of imposing not only on the client, whose counsel has erred, but on counsel, whose duty it is to make up the record, costs commensurate with the breach of this duty."

Petitioners, who were the appellees in the Court below, were powerless to insist upon an abbreviated record. When the respondents, of their own volition sought to diminish the record, petitioners readily agreed.

In the light of the foregoing facts, we respectfully submit that the Court of Appeals abused its discretion when it awarded full costs against petitioners in solido. This Court, under its supervisory powers, should review this matter and make a pronouncement which will be helpful and act as a guidepost for the Courts.

CONCLUSION

It is respectfully submitted that because of all of the foregoing, the Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: New York, N. Y.,
October 22, 1948.

APPENDIX

28 United States Code. Approved June 25, 1948
effective September 1, 1948

Sec. 1254—Court of Appeals—Certiorari

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Partnership Law—Chapter 39 of Consolidated Laws of the State of New York

Article 5. Property Rights of a Partner (§§ 50-54).

Section 53: Assignment of partner's interest. 1. A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

Article 8. Limited Partnerships (§§ 90-119).

Section 98. Rights, powers and liabilities of a gen-

eral partner. (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

• • • • • • •

(e) Admit a person as a general partner.

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate.

Rules of Court of Appeals, Fifth Circuit

Rule 31—Costs.

(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.